81-74

Case No. ~~80-457~~

Office-Supreme Court, U.S.
FILED
JUL 9 1981
ALEXANDER L. STEVAS,

In The

Supreme Court of the United States

October Term, 1981

HOLLISTER K. COTTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Appeal from the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOSEPH SAINT-VELTRI
JERALYN E. MERRITT

50 South Steele Street, #375
Denver, Colorado 80209
Telephone: (303) 388-6252

Attorneys for Petitioner

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTION PRESENTED

Whether Section 2 of Title 18, U. S. C. (PRINCIPALS) can be utilized as a predicate for violation of the Controlled Substance Act of 1970—does the "rule of lenity" apply?

TABLE OF CONTENTS

	Pages
Question Presented	i, 2
Opinions Below	2
Jurisdiction	2
Constitutional Provisions Involved	3
Statement	3
Reasons for Granting the Writ	4
Conclusion	4
Appendix A	App. 1
Appendix B	App. 11

TABLE OF AUTHORITIES

CASES:

Bifulco v. United States, — U. S. —, 65 L. Ed. 2d 205, 100 S. Ct. — (1980)	4

STATUTES:

Title 28 U. S. C., § 1254 (1)	2
18 U. S. C., § 2	2, 3
21 U. S. C., § 841 (a) (1)	3

CONSTITUTION:

Constitution of the United States, Fifth Amendment	3

Case No. 79-467

In The

Supreme Court of the United States

October Term, 1981

HOLLISTER K. COTTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Appeal from the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Hollister K. Cotton, the Petitioner, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled cause on March 11, 1981.

OPINIONS BELOW

This cause was decided by a panel of the United States Court of Appeals for the Tenth Circuit on March 11, 1981, in an opinion which has been designated for routine publication. The opinion is reproduced as Appendix A hereto. A Petition for Rehearing was denied on May 27, 1981.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on March 11, 1981. (See Appendix A.)

The jurisdiction of this Court is invoked under Title 28 U. S. C., § 1254 (1).

QUESTION PRESENTED

Whether Section 2 of Title 18, U. S. C. (PRINCIPALS) can be utilized as a predicate for violation of the Controlled Substance Act of 1970—does the "rule of lenity" apply?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Fifth Amendment.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT

The Defendant, Hollister K. Cotton, was convicted of Distribution of a Controlled Substance in violation of Title 21, United States Code, § 841 (a) (1) and Title 18, Section 2. The Defendant filed a pre-trial motion to dismiss Count II of the Indictment (the single count in which he was charged) on the basis that utilization of Section 2 of Title 18 in conjunction with the provisions of the COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970 was impermissible. The Defendant provided the trial court with an Affidavit of an individual who was integral in the passage of the Act (the Affidavit is Appendix B herewith). The trial court denied the Motion to Dismiss.

REASONS FOR GRANTING THE WRIT

This Honorable Court should grant the Writ in order to establish whether this question of first impression before this Honorable Court was misjudged by the Tenth Circuit Court of Appeals in its failure to adopt the "rule of lenity". *See Bifulco v. United States,* — U. S. —, 65 L. Ed. 2d 205, 100 S. Ct. — (1980).

———o———

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

JOSEPH SAINT-VELTRI
JERALYN E. MERRITT

50 South Steele Street, #375
Denver, Colorado 80209
Telephone: (303) 388-6252

Attorneys for Petitioner

APPENDIX A

PUBLISH

No. 79-2165

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

HOLLISTER K. COTTON,

Defendant-Appellant.

Appeal From the United States District Court
For the District of Colorado

(D. C. No. 79-CR-467)

(Filed March 11, 1981)

Brian G. McConaty, Assistant United States Attorney (Joseph Dolan, United States Attorney, and Daniel R. Christopher, Assistant United States Attorney, on the brief), Denver, Colorado, for Plaintiff-Appellee.

Joseph Saint-Veltri (Jeralyn E. Merritt with him on the brief), Denver, Colorado, for Defendant-Appellant.

Before HOLLOWAY, McWILLIAMS, and BARRETT, Circuit Judges.

BARRETT, Circuit Judge.

Hollister (Holly) K. Cotton (Cotton) appeals his jury conviction of distributing cocaine in violation of 21 U. S. C. A. § 841 (a) (1)[1] and 18 U. S. C. A. § 2[2] as charged in Count II. Cotton was charged with Lewis Leon McCutcheon in a two count indictment. Prior to trial, the Court, on its own motion, severed Counts I and II, directed that trial would proceed on Count II first, and also, thereafter, severed the trials of Cotton and McCutcheon on Count II. Count II charged:

> On or about July 18, 1979, in the State and District of Colorado, HOLLISTER K. COTTON and LEWIS LEON McCUTCHEON did unlawfully, knowingly and intentionally distribute a quantity of cocaine, a Schedule II narcotic controlled substance in violation of Title 21 United States Code, Section 841 (a) (1) and Title 18, United States Code, Section 2.

The Government developed its case against Cotton largely through the testimony of two witnesses, Robert Baker, a paid government informant employed by the Department of Justice, Drug Enforcement Administration (DEA) and Dewey Greager, a special agent of the DEA. Baker and Greager testified in detail relative to negotiations involving themselves and McCutcheon for the purchase of cocaine and Cotton's participation therein.

---

[1]Section 841 (a) (1) provides:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to . . . distribute . . . a controlled substance.

[2]Section 2 provides in part:

Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Baker testified that: on the day of the sale he and McCutcheon drove from Carbondale, Colorado to Boulder, Colorado where they went to a Denny's restaurant; upon arriving at the restaurant, McCutcheon made a phone call, after which he left Baker "to meet his man across the street"; thereafter, Baker and McCutcheon left Denny's and walked across the street to the Dark Horse Bar "to meet his [McCutcheon's] man Holly at the Dark Horse Bar"; when they arrived at the bar he met Holly (Cotton); and that during their meeting at the bar, McCutcheon and Cotton related "there was a pound of cocaine available" and that the "meeting had been set for 9:30 that night to consummate the deal on the cocaine."

Agent Greager testified that: he met with Baker and McCutcheon on the evening of the sale at Denny's restaurant; they left Denny's and went for a ride in Baker's car during the course of which he was allowed to inspect the cocaine McCutcheon had for sale; while riding in the car "I asked McCutcheon if the weight was correct on it and if he in fact had weighed the cocaine. McCutcheon said, no, he had not weighed it, he was sure that Holly had weighed it because Holly had a set of scales . . ."; at a later meeting that evening at Denny's, McCutcheon introduced Cotton to him and stated "That's my man"; and that after a deal was agreed upon and the three (McCutcheon, Cotton and Greager) were exiting Denny's he told Cotton "We need to get together for some future business", to which Cotton replied, "No, I want you and Lewis to handle that. I don't want anything to do what [sic] that part of it." Subsequent thereto, McCutcheon and Cotton were arrested a short distance from Denny's.

Cotton's defense consisted of one witness who testified that Baker had, on several occasions, given him some pills at a time when he was in a great deal of pain.

On appeal Cotton contends the trial court erred in: (1) denying his motion to dismiss Count II of the indictment; (2) admitting statements of McCutcheon in violation of his Sixth Amendment rights; (3) declining to reread the instructions on aiding and abetting, after the jury had requested a clarification of said charge; (4) instructing the jury; (5) denying his numerous objections, requests and motions advanced during trial; and (6) failing to grant his motions for judgment of acquittal, new trial, and motion in arrest of judgment.

I.

Cotton contends the trial court erred in denying his motion to dismiss Count II of the indictment. Cotton argues that the union of 18 U. S. C. A. § 2 and 21 U. S. C. A. § 841 (a) (1) in Count II was improper inasmuch as the enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Act) brought all of the drug control laws into one comprehensive act. In support of this contention Cotton cites to *United States v. Stanley*, 545 F. 2d 661 (7th Cir. 1976), *cert. denied*, 436 U. S. 917 (1978), for the proposition that the Act was intended to deal in a "comprehensive fashion with the growing menace of drug abuse" and *United States v. Pruitt*, 487 F. 2d 1241 (8th Cir. 1973) for the proposition that the Act is "all inclusive in covering the entire field of narcotics". We recognize that the Act was purposely drafted broad enough to encompass the entire gambit of the "growing menace of drug abuse" within the United States. However, we can-

not conclude, as Cotton urges, that the passage of the Act was the death knell for charging aiding and abetting in drug related cases. Cotton has misconstrued the interrelationship of the crime of aiding and abetting with substantive criminal statutes.

In *Nye and Nissen v. United States*, 336 U. S. 613 (1949) the Court opined:

> Aiding and abetting rests on a broader base; it states a rule of criminal responsibility for acts which one assists another in performing. The fact that a particular case might conceivably be submitted to the jury on either theory is irrelevant. It is sufficient if the proof adduced and the basis on which it was submitted were sufficient to support the verdict.
>
> 336 U. S. at p. 620.

In *United States v. Alvillar*, 575 F. 2d 1316 (10th Cir. 1978) we stated, *citing to Breeze v. United States*, 398 F. 2d 178 (10th Cir. 1968):

> But that language [of 18 U. S. C. § 2] neither defines nor denounces as criminal any act or omission which, without it, would have been lawful. It is rather a statutory canon defining an ingredient of criminal responsibility generally, than the definition by law of any crime. It simply provides for punishment as a "principal" of any one who, by his conduct brings himself within the reach of the many suppositions included in . . . either of the foregoing two paragraphs. 575 F. 2d at pp. 1319-1320.

See also: United States v. Sacks, 620 F. 2d 239 (10th Cir. 1980) *citing to United States v. Taylor*, 612 F. 2d 1272 (10th Cir. 1980), *cert. denied*, 444 U. S. 1092 (1980).

We have heretofore rejected contentions that 18 U. S. C. A. § 2 cannot be combined with other criminal

charges. In *United States v. Alvillar, supra,* we rejected the contention that § 2 could not be charged together with 8 U. S. C. A. § 1324 (a) (2) (importation of illegal aliens) *citing to Pereira v. United States,* 347 U. S. 1 (1954) in which the Court opined:

> To constitute a violation of these provisions, it is not necessary to show that petitioners actually mailed or transported anything themselves; it is sufficient if they caused it to be done.
>
> 575 F. 2d at p. 1320.

See also: United States v. Gonzalez, 582 F. 2d 1162 (7th Cir. 1978).

Applying these standards, we hold that the trial court did not err in denying Cotton's motion to dismiss Count II of the indictment. The union of 18 U. S. C. A. § 2 and 21 U. S. C. A. § 841 (a) (1) in Count II was proper. In *United States v. Harper,* 579 F. 2d 1235 (10th Cir. 1978), *cert. denied,* 439 U. S. 968 (1978), *citing to Roth v. United States,* 339 F. 2d 863 (10th Cir. 1964) we observed that the essential elements of aiding and abetting are that a defendant "associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." [579 F. 2d at p. 1238].

The Government, having established Cotton's participation in the cocaine sale, was not limited to charging him exclusively under 21 U. S. C. A. § 841 (a) (1). A defendant may be convicted of two charges, even though the charges arise from a single act or series of acts, providing each requires proof of a fact not essential to the other. *Pereira v. United States, supra.* Adoption of Cotton's

contentions would violate the efficacy of this well established, long standing principle.

Furthermore, although not dispositive, we observe that whereas Cotton was found guilty "as charged in the Indictment herein" [R., Vol. I, at p. 142] which included 21 U. S. C. A. § 841 (a) (1) and 18 U. S. C. A. § 2, the "Judgment and Probation/Committment Order" entered by the trial court provided only:

> Defendant has been convicted as charged of the offense(s) of possession with intent to distribute a Schedule II controlled substance (cocaine) in violation of Title 21, U. S. Code, Sec. 841 (a) (1).
>
> [R., Vol. I, at p. 158].

Cotton's conviction under 18 U. S. C. A. § 2 was obviously not considered by the Court in the sentencing proceeding. Under these circumstances, Cotton's allegations of error surrounding the dual charges within Count II are without merit.

II.

Cotton contends the trial court erred in admitting statements of co-defendant McCutcheon, and that the admission of McCutcheon's statements was in derogation of his Sixth Amendment rights.

"It is axiomatic that statements made by one conspirator out of the presence of other coconspirators may be used not only against the declarant but also against his coconspirators when made in furtherance of the conspiracy." *United States v. Rios*, 611 F. 2d 1335, 1340 (10th Cir. 1979). *See also: United States v. Nixon*, 418 U. S. 683, 701 (1974); *United States v. Petersen*, 611 F. 2d 1313 (10th

Cir. 1979), *cert. denied*, — U. S. — (1980); *United States v. Andrews*, 585 F. 2d 961 (10th Cir. 1978). Furthermore, even when conspiracy is not charged, as here, statements of coconspirators are admissible where the existence of a conspiracy is independently established. *United States v. Durland*, 575 F. 2d 1306 (10th Cir. 1978). *See also: United States v. Brewer*, 630 F. 2d 795 (10th Cir. 1980); *United States v. Petersen, supra.*

The record clearly establishes that the District Court applied *Andrews, supra*, and its progeny, correctly. Moreover, at defense counsel's request, the Court immediately charged the jury that they retained sole responsibility for assessing the evidence's probative value [R., Vol. IV, at p. 58]. No error occurred in the admission of the challenged testimony.

III.

Cotton contends the trial court erred in failing to reread the instructions given to the jury on aiding and abetting after the jury, in the course of its deliberations, requested a clarification of said charge from the Court. The trial court disposed of the jury's request in the following manner:

> The Court: Well, let's bring them in and see what they want, okay? Do you want to do that and bring in the jury? I'll get that cleared up.
>
> (Jury now present)
>
> The Court: I have a message from you which says:
>
> "We would like to get clarification of the charge against Hollister Cotton regarding what is stated on

the True Bill and the oral instruction given us (aiding and abetting Mr. McCalister—

The Foreman: That should be McCutcheon.

The Court: Okay, you don't have those two confused.

The Foreman: No, we don't, no.

The Court: All right. The defendant in this case, Hollister Cotton is charged with the offense of aiding and abetting the commission of the crime of knowingly or intentionally distributing a controlled substance.

The Foreman: Okay, that's all we need to understand.

The Court: That's all you need to know?

(Jurors nodding heads)

The Foreman: It wasn't stated so in the— (indicating).

The Court: That's all right. You're not in an English class. How about it?

Mr. Casteel: [Prosecution counsel] No objection to the instructions.

Ms. Merritt: [Defense counsel] No objection.

The Court: All right, thank you.

(Jury retiring for further deliberations)

[R., Vol. IV, at pp. 212-213].

Although defense counsel stated she had "no objection" to the trial court's response to the jury's question, appellate counsel now contends the response was "inadequate and inappropriate", and that the trial court should have reread the previously given instructions. We hold that the trial court did not err in responding to the jury's question.

When the jury makes explicit its difficulty with a closing instruction, the court should ". . . clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U. S. 607, 612-13 (1946); *United States v. Walker*, 557 F. 2d 741 (10th Cir. 1977). However, the simple reading to the jury of an instruction previously given is a matter for the sound discretion of the trial court. *United States v. Brunetti*, 615 F. 2d 899 (10th Cir. 1980). We will not impute an abuse of discretion to the trial court when, as here, the jury responds affirmatively and favorably to the trial court's clarification and no objection is lodged by trial counsel.

IV.

We have carefully considered Cotton's remaining allegations of error and find them to be individually and collectively without merit.

WE AFFIRM.

APPENDIX B

CHAYET AND SONNENREICH, P. C.
Attorneys at Law

Watergate 600, Suite 720
600 New Hampshire Avenue, N. W.
Washington, D. C. 20037

(202) 965-4150
Cable SONNET

Neil L. Chayet
Michael R. Sonnenreich
Michael X. Morrell
Harvey W. Freishtat
Anthony J. Roccograndi
Alan H. Einhorn
Daniel F. Shaw
Kenneth G. Kluess

James M. Menger
of Counsel

Boston Office
One Federal Street
Thirty-fourth Floor
Boston, Massachusetts 02110

(617) 357-0202

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 79-CR-467

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEWIS LEON McCUTCHEON and
HOLLISTER K. COTTON,

Defendants.

AFFIDAVIT OF MICHAEL ROY SONNENREICH IN SUPPORT OF DEFENDANT HOLLISTER K. COTTON'S MOTION TO DISMISS THE INDICTMENT

AFFIDAVIT

City of Washington, District of Columbia, ss.

MICHAEL ROY SONNENREICH, being first duly sworn, deposes and says:

1. I am Michael Roy Sonnenreich, an attorney duly admitted to practice law in the District of Columbia and in the Commonwealth of Massachusetts.

2. I am presently engaged in private practice of law as a senior partner in the firm of Chayet and Sonnenreich, P. C., with offices at Watergate 600, Suite 721, Washington, D. C. 20037. Our law firm also has offices in Boston, Massachusetts at One Federal Street, 34th Floor, Boston, Massachusetts 02114.

3. I am submitting this affidavit in support of Hollister K. Cotton's Motion to Dismiss the Indictment in Criminal Case Number 79-CR-467 based upon the fact that the United States Attorney apparently went beyond the Congressional mandate included within the structure of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (PL91-513); 21 USC §§ 801 *et seq.* by allowing the Grand Jury to consider the aiding and abetting provision of 18 USC Title 2, as well as the all-inclusive provisions within 21 USC § 841 (a) (1).

4. I am not retained as counsel by any of the above-referenced Defendants nor have I been retained, in any capacity, as a consultant in this pending criminal case.

5. I do not personally know any of the Defendants in this case, nor do I have knowledge of the nature of any of the factual allegations germane to this case other than the fact that apparently the Grand Jury, in deliberating

upon alleged violations of the Comprehensive Drug Abuse Prevention and Control Act, 18 USC §§ 801 *et seq.*, also had before it consideration of the Title 18, United States Code, Section 2, the so-called "aiding and abetting" section.

6. Upon receiving a J. D. degree from Harvard Law School in 1963, I was employed by the United States Department of Justice from 1964 until I was named Executive Director of the National Commission on Marijuana and Drug Abuse in 1972. During the course of my employment at the Department of Justice, and, in particular, the Federal Bureau of Narcotics and Dangerous Drugs (BNDD), I held a variety of senior legal positions, including Deputy General Counsel of BNDD.

7. In the Department of Justice, I was assigned to the Legislation and Special Projects Section where I devoted a substantial portion of time to the writing of an Administration proposal in the form of a Comprehensive Drug Act which ultimately was submitted by the Administration to the Congress in 1969. During my tenure as Deputy General Counsel of BNDD, I was assigned the responsibility for assuring, along with the Deputy Associate Attorney General, that the Administration's proposed Comprehensive Drug Enforcement bill be shepparded through the Congress of the United States in conformance with the Administration's position.

8. In addition to my above-stated functions, I also served as a Special Assistant to the United States Attorney for the District of Columbia.

9. After the Administration submitted to the Congress its recommendations for a Comprehensive Controlled

Substances Act in 1969, I then assisted and participated with the Director of BNDD, John Ingersoll, in the preparation and presentation of the Department of Justice's testimony to the three relevant Committees of the House and Senate that held extensive hearings on these bills. Our testimony included recommendations on the law enforcement positions relating to, *inter alia*, the control of both licit and illicit substances and appropriate penalties to be applied to violations of the proposed statute.

10. The Department of Justice was primarily committed to the enactment of a comprehensive substance control statute which would incorporate more than 50 separate pieces of Federal legislation (passed during a 55-year period) relating to the control of both licit and illicit substances into one single and comprehensive Federal statute.

11. During the course of testimony, which I gave on behalf of the Department of Justice (along with the Attorney General of the United States and the Director of the BNDD), and during my frequent meetings with House and Senate members, as well as their respective staffs, in 1969 and 1970, I stressed the Administration's position that the proposed Act was intended to collect the then existing fragmented and diverse drug control and inforcement laws, including their related penalty structures into one unified, comprehensive legislative enactment, thereby better facilitating Federal regulation and control.

12. I personally participated in multiple public hearings and extensive staff negotiations and mark-up sessions before the House Interstate and Foreign Commerce Committee (Subcommittee on Public Health and Welfare), the

House Ways and Means Committee, and the Senate Judiciary Subcommittee Investigating Juvenile Delinquency.

12. The legislative history of the Comprehensive Drug abuse Prevention Control Act reveals a legislative intent "to collect the diverse drug control and enforcement laws under one piece of legislation to facilitate law enforcement, drug research, education and related control activities." S. Rep. No. 613, 91st Cong. 1st Sess. 3 (1969). This purpose, enunciated in the purpose's clause of the Senate's report on S. 3246, was repeated throughout the testimony and hearings on the various bills.

13. It is my underatanding that the matter before this court involves the interpretation to be given Title 21 Sec. 841 (a) (1) which deals with those individuals who by definition are deemed under the Act to have violated its provisions. Since the primary purpose of the Act was to provide for a single legal vehicle for the enforcement of the drug laws, it logically follows that the purpose of Title 21 Section 841 (a) (1) was to provide a means of comprehensive identification of violators of the drug laws and to further provide for their prosecution. In order to accomplish this purpose, it is necessary to interpret Section 841 (a) (1) as superceding preexisting and coexisting regulations regarding violations of the drug laws of the United States including Article 2 of Title 18 which provides the general definitional provisions for aiders and abettors under that Title.

14. As set forth above, both the comprehensive language of the Act and the extensive legislative history manifest the clear intent of Congress to provide for an exclusive method of classification and corresponding prosecution of

individuals coming within the perview of the Act's prohibitions.

/s/ Michael Roy Sonnenreich

Subscribed and sworn to before me this 15th day of September, 1979.

/s/ Robert Marvel Ross
Notary Public

My Commission Expires January 1, 1983.